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INC. and GK TECHNOLOGIES, INC.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HOUSING AUTHORITY OF THE CITY OF )  
LOS ANGELES )

Plaintiff. )

vs. )

PCC TECHNICAL INDUSTRIES, INC., a )  
Delaware Corporation et al. )

Defendants. )

AND ALL RELATED ACTIONS )  
 )

**CASE NO. 2:11-cv-01626 FMO  
(CWx)**

Assigned to Hon. Fernando M.  
Olguin

**DEFENDANTS'  
SUPPLEMENTAL BRIEF RE:  
BIFURCATION**

Trial Date: May 19, 2015

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1 **I. INTRODUCTION**

2 This Court's October 13, 2015 Order re *Ex Parte* Application (Dkt. 850)  
 3 directed the parties to attend the pre-trial conference on October 30, 2015  
 4 "prepared to discuss bifurcating liability and damages phases of trial as well as  
 5 which issues should be tried to a jury and which should proceed at a bench trial."  
 6 In the [Proposed] First Amended Pretrial Conference Order, the parties have  
 7 outlined their respective positions on which issues should be tried to the jury and  
 8 which should proceed to a bench trial. To assist the Court in addressing the  
 9 question of whether the claims in this matter are amenable to bifurcation between a  
 10 liability phase and a damages phase, Defendants GK Technologies, Inc. ("GK  
 11 Tech"), PCC Technical Industries, Inc. ("PCC Tech"), Southwest Steel Rolling  
 12 Mills, Inc. ("New Southwest"), Lester Ruben Corporation No. 1, Lester Ruben  
 13 Corporation No. 2, Lester Ruben Corporation No. 3, Finkelstein Foundation, Estate  
 14 of Lester M. Finkelstein, Deceased, Estate of Ruben Finkelstein, Deceased, and  
 15 Southwest Steel Rolling Mills ("Old Southwest" and collectively, the  
 16 "Defendants") submit this Joint Supplemental Brief re Bifurcation Issues. For the  
 17 reasons set forth below, the Defendants believe that it would be impractical and  
 18 ineffective to bifurcate liability and damages phases of trial for this matter.

19 **II. CLAIMS AT ISSUE**

20 Following the Court's January 26, 2015 Order re HACLA's Motion for  
 21 Summary Judgment (Dkt. 748), October 2, 2015 Order re Assumption of  
 22 Liabilities Claims (Dkt. 848), and October 13, 2015 Order re Trespass and  
 23 Nuisance Claims (Dkt. 849), the issues that remain to be tried in this case are as  
 24 follows:

25 **A. CERCLA/HSAA Claims:**

- 26 1. Whether or to what extent the costs which HACLA seeks to  
 27 recover from Defendants are "necessary" to respond to the  
 28 release or threatened release of hazardous substances by  
 Defendants at the Site.

2. Whether the costs which HACLA seeks to recover from the Defendants are consistent with the NCP.
3. Whether each of the defendants with which HACLA has reached a prior settlement (the “Settling Defendants”)<sup>1</sup> is within one of the four classes of persons subject to the liability provisions of 42 U.S.C. section 9607(a).<sup>2</sup>

**B. Nuisance & Trespass Claims:**

4. Whether the seriousness of the harm suffered by HACLA outweighs the social utility of Defendants’ conduct.
5. Whether the harm that HACLA claims amounts to a continuing trespass and/or continuing nuisance (i.e., whether the contamination is capable of being abated at a reasonable cost and by reasonable means).
6. Whether Defendants are presently liable for the costs incurred by HACLA to remediate the Site.
7. Whether the harm that HACLA claims occurred more than three (3) years before the February 2011 filing of the Complaint in this action.

**C. Assumption Issues:**

8. Whether GK Tech assumed liability for any contamination at the Site caused by activities of New Southwest Steel prior to 1979 as a “known liability” of New Southwest Steel in 1993.
9. Whether PCC Tech assumed liability for any contamination at the Site caused by the activities of the Old Southwest Steel prior to July 1969.

**D. All Claims:**

10. The total amount of response costs/damages that HACLA is entitled to recover in this matter under any theory.
11. Whether HACLA was negligent [in purchasing the Site without conducting adequate due diligence in light of known environmental conditions of concern].
12. Whether HACLA’s negligence was a substantial factor in causing its harm.
13. Whether the acts of others, including adjacent property owners and operators, and those owners and operators who followed the Defendants at the Site—including but not limited to the

<sup>1</sup> For these purposes, Settling Defendants include former third-party and fourth-party Defendants and Cross-Defendants who have paid to settle claims asserted against them in this action and/or have sought good faith determinations of their settlements from the court.

<sup>2</sup> The Court has already determined that HACLA is within one of the four classes of persons subject to the liability provisions of 42 U.S.C. § 9607(a) (see Dkt. 173).

Plaintiff, the Settling Defendants, and the parties who graded the site, spreading and mixing any contaminated soil from isolated portions of the Site to across the entire Site, those who imported contaminated fill to the Site, and those who applied road oil and other substances to the soils at the Site—were superseding cause(s) of Plaintiff’s claimed damages.

14. Whether Plaintiff’s claimed harm to its property could have been avoided by reasonable efforts or expenditures.

15. The equitable allocation of recoverable response costs, if any, among HACLA, the Settling Defendants, adjacent landowners and/or operators, and the Defendants.<sup>3</sup>

As will be explained more fully below, most, if not all, of the remaining issues to be tried are interdependent and cannot be meaningfully tried in a bifurcated manner. Moreover, the resolution of each of HACLA’s claims is going to be directly impacted by evidence of facts still being developed in the field (i.e., at the Site) as of the date of this Supplemental Brief, making bifurcation a practical impossibility at this time as well.

### **III. FACTUAL CIRCUMSTANCES**

The Interim Remedial Action Plan (“IRAP”) for the Site identified five primary contaminants of concern at the Site: lead, arsenic, TPH, PCBs and naphthalene. Since April 2015, HACLA’s contractors have been working at the Site to implement the IRAP, which included excavation and disposal of soils in discrete areas of the Site specified in the IRAP. (Decl. of John Bollier in Support of Supp. Br. ¶¶ 5-7.) Prior to April 2015, all of that sampling data relied upon by HACLA’s contractors at the Site, *and the various experts in this case*, showed no elevated concentration of contaminants outside of those discrete areas specified in the IRAP. (*See id.* at ¶¶ 5-7, 12, 17.)

Since April 2015, HACLA’s contractors implementing the IRAP at the Site have reportedly spent approximately \$13 million implementing the IRAP and concluded, based upon 126 “pothole” samples from outside the discrete areas

<sup>3</sup> Issues 11, 12, 13 and 14 all go to affirmative defenses pled by the Defendants as well as to the equitable allocation of recoverable response costs, if any, among HACLA, the Settling Defendants and the Defendants.

1 identified for remediation in the IRAP, that soil contamination is far more  
 2 widespread than anyone had previously concluded. (*See* Dkt. 857 § 13.b.2; Dkt.  
 3 847-2 [Decl. of Walter J. Lipsman].) All of this “new data” has been developed  
 4 since the close of discovery on January 15, 2015. Very little of this “new data” has  
 5 yet been provided to the Defendants. (*See* Decl. of Dennis M. P. Ehling ¶¶ 4-5.)

6 The Court found that all of the Defendants other than GK Tech are PRPs  
 7 under CERCLA (and, therefore, the HSAA), and that such findings establish the  
 8 majority of the elements necessary for HACLA’s nuisance and trespass claims.  
 9 (*See* Dkts. Nos. 748, 849.) Each of these orders make findings relating to the  
 10 Defendants’ responsibility for lead and arsenic contamination at the Site, but not as  
 11 to any other contaminants of concern found on the Site. (*Id.*)

#### 12 **IV. OVERLAPPING ISSUES**

##### 13 **A. Equitable Allocation and Total Recoverable Response Costs**

##### 14 **Overlap in HACLA’s CERCLA and HSAA Claims**

15 The Court has already determined that each of the Defendants, other than  
 16 GK Tech, is a potentially responsible person (“PRP”) under CERCLA. (*See* Dkt.  
 17 748). Therefore, the remaining issues to be tried under HACLA’s CERCLA and  
 18 HSAA claims are: (i) HACLA’s total recoverable response costs; and (ii) the  
 19 equitable allocation among HACLA, the Settling Defendants and the Defendants.  
 20 In its statement regarding bifurcation in the First Amended [Proposed] Final Pre-  
 21 Trial Conference Order (Dkt. 857 § 13.b.ii), HACLA suggests that if the trial of  
 22 this case were bifurcated between “liability” and damages (which HACLA does  
 23 not prefer), issues regarding the equitable allocation of response costs could be  
 24 tried as part of the “liability” phase, and questions regarding HACLA’s total  
 25 recoverable response costs could be tried as part of the “damages” phase.<sup>4</sup> A  
 26 number of courts to have faced this issue, though, have treated “liability” as

27  
 28 <sup>4</sup> HACLA stated in the First Amended [Proposed] Final Pre-Trial Conference Order (Dkt. 857 § 13.b.ii) its belief that trial should begin on all issues after completion of the remediation, to avoid the cost and uncertainty of two trials, but that liability and damages should be bifurcated if the current trial schedule is to be maintained.



1 distinctly separate from “allocation” and found that allocation and damages issues  
 2 are more appropriate handled in the same phase, after the initial “liability” is  
 3 established. *See, e.g., Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667-68 (5th  
 4 Cir. 1989) (noting that courts regularly bifurcate “*liability* and *remedial*, or  
 5 damages, phases in CERCLA litigation,” but “more complicated and technical  
 6 questions of the appropriate cleanup measures and appropriate fault of liable  
 7 parties” are better handled in the remedial phase); *United States v. Alcan Aluminum*  
 8 *Corp.*, 990 F.2d 711, 720 (2d Cir. 1993).

9 As a practical matter, although “liability” and “damages” inquiries in a  
 10 CERCLA case may be distinct, a clean line of demarcation between *allocation* and  
 11 “damages” issues in this case is not possible.<sup>5</sup> HACLA’s total recoverable  
 12 response costs (i.e., its “damages”) will be based, in large part, on the  
 13 determination of the scope and total costs of the work undertaken by HACLA at  
 14 the Site to remediate the contaminants of concern, and whether that work was  
 15 “necessary” to respond to the presence of contaminants and undertaken consistent  
 16 with the NCP. *See AmeriPride Servs., Inc. v. Texas Eastern Overseas, Inc.*, 782  
 17 F.3d 474, 489-90 (9th Cir. 2015); *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270  
 18 F.3d 863, 870-71 (9th Cir. 2001). Of necessity, the determination of these issues  
 19 will be dependent on HACLA’s demonstration at trial of the extent of  
 20 contamination at the Site, the measures undertaken by HACLA to remediate that  
 21 contamination, and the costs of those measures. *Id.* The equitable allocation of  
 22 those response costs among HACLA, the Settling Defendants, and the Defendants  
 23 will be based upon a number of equitable factors, many of which will overlap with  
 24 the evidence and factors addressing “necessity” and NCP compliance.

25  
 26  
 27 <sup>5</sup> To be clear, the Defendants do not contend that questions regarding *divisibility* – i.e. as a defense to  
 28 CERCLA’s general presumption of joint & several liability for PRPs – could never, in the right circumstances, be  
 adjudicated in a separate phase of trial from the remedial or “damages” phase. But the questions of proper equitable  
*allocation* of costs at issue here are distinct from *divisibility*, and depend on factors of equitable apportionment of  
 costs, not liability under CERCLA.

1 In making a determination of equitable allocation, Courts typically look at  
2 the so-called Gore Factors and Torres Factors, including:

- 3 (1) The ability of each party to demonstrate that their contribution to the  
4 contamination on the Site can be distinguished;
- 5 (2) The amount of hazardous substances involved;
- 6 (3) The degree of toxicity of the hazardous substances involved;
- 7 (4) The degree of each party's involvement in the manufacture, treatment,  
8 transport, or disposal of the hazardous substances;
- 9 (5) The degree of care exercised by each party with respect to the  
10 hazardous wastes concerned, taking into account the characteristics of  
11 such hazardous wastes;
- 12 (6) The degree of each party's cooperation with governmental agencies in  
13 preventing harm to public health or the environment from a release;
- 14 (7) The extent to which costs are related to waste for which each party is  
15 responsible;
- 16 (8) Each party's level of culpability;
- 17 (9) The degree to which each party benefitted from the disposal; and
- 18 (10) Ability to pay.

19 *See, e.g., Env'tl. Trasp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 508 (7th Cir.  
20 1992); *Lockheed Martin Corp. v. U.S.*, 35 F. Supp.3d 92, 123 (D.D.C. 2014).

21 However, in determining allocation of response costs under CERCLA, courts often  
22 also consider additional equitable factors, including the economic benefits realized  
23 by a party as a result of remediation efforts. "Thus, parties that benefitted  
24 financially from remediation are often allocated a larger portion of the response  
25 costs." *City of Wichita v. Trs. of Apco Oil Corp. Liquidating Trust*, 306 F. Supp. 2d  
26 1040, 1101-1102 (D. Kan. 2003); *Yankee Gas Servs. v. UGI Utils., Inc.*, 852 F.  
27 Supp. 2d 229, 249 (D. Conn. 2012); *Lockheed Martin Corp.*, 35 F. Supp. 3d at 123.

1 *See also, Farmland Indus. v. Colorado & E. R.R.*, 944 F. Supp. 1492, 1500-01  
2 (D.Colo. 1996) (allocating 85% of the response costs to Colorado & Eastern, based  
3 in large part on its property value having increased by over \$600,000 as a result of  
4 the cleanup).

5 At trial on the allocation issues, therefore, the parties will undoubtedly  
6 introduce evidence regarding, among other things:

- 7 • the total extent of the contamination at the Site (e.g. how far and at  
8 what concentrations across the Site different contaminants are found);
- 9 • the extent to which each party (including adjacent property owners  
10 and/or operators, and the Settling Defendants) is responsible for the  
11 presence of different contaminants and/or the spread of contaminants  
12 at the Site;
- 13 • the remediation measures undertaken and total amount of clean-up  
14 costs incurred, including the amount of such clean-up costs associated  
15 with each contaminant (including whether certain contaminants such  
16 as PCBs required more costly remediation efforts because of their  
17 toxicity);
- 18 • the responsibility of each party (including HACLA, adjacent property  
19 owners and/or operators, and the Settling Defendant) in causing the  
20 costs to be incurred; and
- 21 • the extent to which any party (most especially HACLA) benefited  
22 from the remediation work at the Site (e.g. by HACLA seeing the  
23 value of its property increased substantially through the work  
24 performed at the Site, and by HACLA completing steps for the  
25 purposes of development of the Site through the remediation process).

26 Each of these issues, however, will also go directly to the determination of whether  
27 the work HACLA has undertaken at the Site is “necessary” and consistent with the  
28 NCP, including for example:

- the total lateral and vertical extent of contamination found at the Site  
and the measures undertaken by HACLA to respond to that  
contamination;<sup>6</sup>
- the measures undertaken by HACLA to respond to each of the  
contaminants (including those such as PCBs, TPH, and naphthalene  
for which none of the Defendants have been held responsible);

---

<sup>6</sup> HACLA will need to prove that the measures taken at the Site were necessary to respond to the contamination, which will require HACLA to prove the extent of contamination and that measures taken were required to respond to that contamination. *See Carson Harbor, supra*, 270 F.3d at 870-71; *AmeriPride Servs., Inc., supra*, 782 F.3d at 489-90.

- the total amount of clean-up costs and whether any of those costs were associated with measures undertaken to respond to contaminants for which the Defendants are not responsible;
- whether any of the clean-up costs would have been any less but for the actions of other parties (including the Settling Defendants who added to and spread the contaminants across the Site after the Defendants left the Site)<sup>7</sup>; and
- “the extent that actions are taken for purposes other than responding to an actual and real public health threat” (i.e. are not “necessary” – including measures taken during the remediation for the purposes of HACLA’s redevelopment of the Site, not removing hazardous substances)<sup>8</sup>.

It cannot be accurately said, therefore, that the determination of the issues related to allocation can be segregated from the determination of the issues regarding HACLA’s total recoverable response costs.

**B. Liability and Allocation Overlap with Total Claimed Damages in HACLA’s State Law Claims**

Based on the Court’s existing orders, HACLA proposes that issues regarding “liability” (including each party’s responsibility for HACLA’s claimed damages) and the recoverable “damages” for HACLA’s state law claims can also be bifurcated. But based on the Court’s existing orders and the Defendants’ affirmative defenses, the remaining issues regarding liability and allocation of responsibility for HACLA’s claimed nuisance and trespass damages will be directly impacted by the total claimed “damages” themselves and the proof of those damages.

As an initial matter, HACLA has the burden to prove to the jury that HACLA has suffered a *continuing* nuisance and/or trespass to overcome Defendants’ statute of limitations defense. *See McCoy v. Gustafson*, 180 Cal. App. 4th 56, 84-86, 108-110 (2009); *Mangini v Aerojet-General Corp.*, 12 Cal. 4th

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<sup>7</sup> Parties who spread contamination are responsible as PRPs. *See Kaiser Aluminum & Chemical Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992) (party is a responsible as a PRP for grading activities that spread contamination and increased the cost of responding to contamination).

<sup>8</sup> There is no CERCLA liability for costs HACLA may have incurred related to such actions. *See G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d 379, 386 (7th Cir. 1995).

1 1087, 1095-96 (1996); *Oildale Mutual Water Co. v. Crop Prod. Servs.*, 2014 WL  
2 824958 \* 5 (E.D.Ca. 2014). HACLA must present evidence showing the  
3 contamination is capable of being abated at a *reasonable* cost and by *reasonable*  
4 means. *Id.* HACLA cannot do so without demonstrating the total cost and method  
5 of remediation. *Id.*; *Starrh & Starrh Cotton Growers v. Aera Energy LLC*, 15 Cal.  
6 App. 4th 583, 597 (2007) (question of permanent vs continuing trespass and  
7 nuisance is for the jury). If the jury finds the contamination to be a permanent  
8 nuisance and/or trespass, the three-year statute of limitations will bar HACLA's  
9 nuisance and trespass claims all together, as HACLA has stipulated that the  
10 Defendants did not own or operate the Site after no later than 1979. *Id.*; *Baker v.*  
11 *Burbank-Glendale-Pasadena Airport Auth.*, 39 Cal.3d 862, 868-69 (1985). Thus,  
12 the jury will need to be informed of the total cost and method of remediation to  
13 establish *any* liability on the part of any of the Defendants. *McCoy v. Gustafson*,  
14 180 Cal. App. 4th at 84-86.

15 Further, as this Court noted, whether Defendants can be held liable for  
16 nuisance depends on the jury's determination on whether the seriousness of harm  
17 suffered by HACLA outweighs any social utility of Defendants' conduct. (See  
18 Dkt. 849, p. 17.) The jury needs to ascertain the total harm HACLA claims to have  
19 suffered. Without that information, the jury will have nothing against which to  
20 balance the social utility of Defendant's conduct.

21 Further, as this Court noted, whether Defendants can be held liable for  
22 nuisance depends on the jury's determination on whether the seriousness of harm  
23 suffered by HACLA outweighs any social utility of Defendants' conduct. (See  
24 Dkt. 849, p. 17.) The jury needs to ascertain the total harm HACLA claims to have  
25 suffered. Without that information, the jury will have nothing against which to  
26 balance the social utility of Defendant's conduct.

27 Likewise, in order to allocate responsibility for HACLA's damages under its  
28 nuisance and trespass claims, the jury will need to determine the proportional

1 responsibility of each party—including HACLA and the Settling Defendants.  
2 Thus, allocation of responsibility will necessarily depend on how HACLA’s  
3 incurred costs relate to the various causes of those costs. The jury will need to  
4 consider evidence of what work was done to address different conditions at the  
5 Site, the total amount of money spent by HACLA to address those conditions, and  
6 lastly, what caused or contributed to the various conditions. For example, the jury  
7 will need to decide what portion of HACLA’s incurred costs was the result of  
8 contaminants released or spread by Settling Defendants, and what portion of the  
9 incurred costs was caused by HACLA’s voluntary and/or negligent actions in  
10 acquiring and developing the Site. The allocation of responsibility, therefore, will  
11 necessarily be dependent on how the costs incurred by HACLA relate to the causes  
12 of those costs, which is a determination that the jury cannot make until it is  
13 presented with evidence of the work done at the Site and the total amount of  
14 money spent by HACLA to address different conditions on the Site.

15 **C. Evidence Relating to Assumption Claims Also Overlaps with**  
16 **Evidence Relevant to Allocation Issues**

17 The parties agree that the issues related to HACLA’s assumption claims  
18 against GK Tech will need to be tried to the jury. (*See* Dkt. 875, § 13.a.).<sup>9</sup> These  
19 issues cannot be bifurcated from the trial of the issues related to HACLA’s  
20 nuisance and trespass claims, therefore, without empaneling two separate juries –  
21 one to address the assumption claims and a second, for reasons set forth in § IV.B  
22 above, after HACLA’s total amount of claimed remediation work and costs are  
23 known. The evidence relevant to those assumption claims, moreover, will overlap  
24 with the evidence that will be presented regarding allocation of liability to New  
25 Southwest, including specifically the nature of New Southwest’s operations at the  
26

27 <sup>9</sup> PCC Tech believes that a jury trial is also required as to any factual disputes regarding whether (i) any  
28 concerns were raised prior to October 1969 regarding operations of any of the Finkelstein Defendants causing soil  
contamination at the Site, or lead or arsenic contamination of any kind, and (ii) any liabilities related to any soil  
contamination, or lead or arsenic contamination of any kind, were reflected or reserved against in any of the  
Finkelstein Defendants’ balance sheets.



1 Site, the extent to which those operations caused contamination to the Site, and the  
2 extent to which anyone was aware that those operations were causing or had  
3 caused contamination to the Site. It would be needlessly duplicative and  
4 inefficient to have these factual issues tried twice to two separate juries, and would  
5 needlessly run the risk of inconsistent verdicts from those two separate juries.

6 **V. ISSUES AFFECTED BY FACTS STILL BEING DEVELOPED**

7 Even assuming no substantial overlapping issues between liability and  
8 damages recoverable by HACLA on those claims, bifurcating liability from  
9 damages will not save the current trial schedule because a number of questions  
10 going directly to liability, and specifically allocation of liability, are directly  
11 impacted by the facts that are still being developed on the ground. Even to the  
12 extent that those facts have already been developed (*e.g.*, the total costs spent by  
13 HACLA to date), only *some* of the evidence regarding those facts has been  
14 produced to the Defendants. This case will not be ready for trial until those facts  
15 are fully developed and the evidence regarding those facts is fully and fairly shared  
16 with the Defendants.

17 **A. Facts Still Being Developed**

18 As HACLA has represented to the Court, after completion of the majority of  
19 the work called for in the IRAP, HACLA took additional “pothole” soil samples  
20 across the entire 21-acre Site and concluded that the contamination it wanted to  
21 address was far more widespread across the Site than contemplated by the IRAP.  
22 (*See* Dkt. 857 § 13.b.2; Dkt. 847-2.) As of the time of filing, however, none of the  
23 data regarding the additional soil samples taken by HACLA’s contractors has been  
24 provided to the Defendants. (*See* Ehling Decl. ¶ 5.) Moreover, despite  
25 Defendants’ requests, HACLA has yet to provide Defendants with essential  
26 information regarding the remediation work actually done to date at the Site,  
27 including: (i) sampling and analysis of the soil stockpiles created during the  
28 excavation work (including stockpile sample location maps, analytical results and

1 statistical analysis of the results received to accurately profile each stockpile of soil  
2 excavated for disposal and/or re-use on-Site), and (ii) analytical reports and chain  
3 of custody documentation for all waste characterization/profiling and confirmation  
4 soil sampling during the primary IRAP implementation. (*See id.* at ¶ 4.) As a  
5 result, the Defendants have not been able to conduct any follow-up discovery  
6 regarding the work already performed at the Site, nor have Defendants’ experts  
7 been able to analyze and develop opinions regarding whether and to what extent  
8 that work is “necessary” to address the contamination at the Site and/or is  
9 consistent with the NCP. (*See id.* at ¶ 6.)<sup>10</sup>

10 HACL A now reports that it will be *at least* the end of April 2016 before the  
11 total costs to address that contamination are known. (*See* Dkt. 847-2.) Further,  
12 HACL A’s contractors have reportedly developed a plan to address the more  
13 widespread contamination at the Site, which includes excavating and hauling off-  
14 site the top 1 to 5 feet of soil across nearly the entire 21-acre Site. (*See id.*)  
15 Neither this plan, nor any of the communications between HACL A and the  
16 Department of Toxic Substances Control (“DTSC”) regarding this plan have been  
17 produced to the Defendants. (*See* Ehling Decl. ¶ 7.)

18 The fact that HACL A now believes contamination at the Site is far more  
19 widespread than was previously reported fundamentally undermines the  
20 sufficiency of the discovery conducted to date regarding the nature and extent of  
21 contamination at the Site. Defendants’ experts believe, moreover, that the  
22 “pothole” sampling conducted by HACL A’s contractors is insufficient to  
23

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24 <sup>10</sup> Discovery in this matter has been closed since January 16, 2015, so the Defendants have been unable to  
25 conduct any follow-up discovery regarding the work at the Site which began in April 2015. Unless and until  
26 exposed to full and fair discovery, no new facts or evidence developed since the close of discovery should be  
27 admissible in this case. *See* Fed.R.Civ.P. 26(e); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106-  
28 07 (9th Cir. 2001) (noting that the failure to timely supplement disclosures upon new evidence will lead to exclusion  
of the evidence unless proponent can establish that the failure was harmless). It is not relevant that HACL A may  
claim lack of bad faith or willfulness; evidence should be excluded unless a less drastic remedy (such as continuing  
the trial to allow appropriate discovery and for the opposing party to prepare for trial) is available. *Id.*; *Castaic Lake  
Water Agency v. Whittaker Corp.*, 2002 WL 34700741 \*11-13 (C.D. Cal. 2002) (discovery regarding evidence that  
arose after the discovery cut-off permitted to prevent prejudice to the opposing party).



1 adequately characterize the nature and extent of the contamination actually present  
2 across the Site. (*See* Bollier Decl. ¶¶ 14-16.) In order to address those  
3 insufficiencies, on October 23, 2015, the Defendants served on HACLA a request  
4 pursuant to Federal Rule of Civil Procedure 34 to enter the Site and conduct their  
5 own rigorous, scientific sampling of the soils across the Site. (*See* Ehling Decl. ¶  
6 8, Ex. C.) This sampling is expected to take 4-5 weeks to complete once it  
7 commences. (*Id.*)

8 **B. The Developing Facts Have a Direct Impact on Liability Issues**

9 The “new data” from the work done at the Site since April 2015, including  
10 the additional sampling conducted by HACLA’s contractors, does not only raise  
11 questions about the likely total cost to complete the remediation work HACLA  
12 intends to undertake. The “new data” fundamentally calls into question the  
13 sufficiency of the factual predicates underlying the opinions of each expert witness  
14 retained to address liability and allocation issues.

15 As explained by Defendants’ expert John Bollier, all of the experts who have  
16 submitted opinions in this case—including specifically Plaintiff’s causation expert  
17 Robert Kadlec and Plaintiff’s allocation expert Philip Tringale, and Becker  
18 Brothers’ rebuttal allocation expert, Christopher Loos—relied on the soil sampling  
19 data that pre-dated April 2015. (*See* Bollier Decl. ¶¶ 12, 17.) All of that sampling  
20 data showed there were no concentrations of the relevant chemicals of concern  
21 outside of the defined geographic limits of excavation set out in the IRAP. (*See id.*  
22 at ¶ 6.) If the report of the sampling results from the 126 “pothole” samples taken  
23 by HACLA’s contractors is accurate, any conclusions regarding the nature and  
24 extent of the contamination at the Site drawn by all of the consultants to have  
25 looked at the Site are incomplete and/or inaccurate.<sup>11</sup> Likewise, all of the experts  
26

27 <sup>11</sup> Based on the existing sampling data and defined geographic limits of remediation work in the IRAP, the  
28 parties’ various experts estimated the costs to implement the IRAP to be between \$5 million and \$11.3 million.  
(Dkt. 847-2 ¶ 5.) If the report of the costs HACLA has incurred to date on implementing the IRAP are accurate,  
those estimates were anywhere from \$1.7 million to \$8 million off.

1 relied on estimates of the toxicity of the contaminants in the soil that HACLA's  
2 consultants apparently have since concluded were inaccurate. (*See* Dkt. 847-2 ¶  
3 7.b.) The "new data" generated since April 2015 could have a direct impact,  
4 therefore, on the experts' opinions regarding the source(s) of the lead and arsenic  
5 at the Site and the parties responsible for that lead and arsenic. (*See, e.g.,* Bollier  
6 Decl. ¶¶ 13-14.) In order to properly address liability and allocation issues,  
7 therefore, all parties in fairness need to have the opportunity to review, confirm,  
8 and assess the impact of this new data. *C.f. Perez v. First American Title*  
9 *Insurance Company*, 910 F. Supp. 2d 986, 989 (D. Ariz. 2011) (finding that where  
10 a party supplements disclosures after discovery cut-off based on later-developed  
11 evidence, in fairness opposing party should have a chance to respond with  
12 supplement to their own expert's opinion and producing party should have chance  
13 to depose opposing party's expert on supplemental opinion).

14 Moreover, without access to this "new data"—as confirmed and/or rebutted  
15 through discovery and by more rigorous sampling conducted by Defendants'  
16 experts—the Court will lack critical pieces of information that go directly to the  
17 application of the Gore and Torres factors for allocating liability here. As  
18 discussed above, the new data very well could go directly to the question of  
19 whether and to what extent it is possible to distinguish the parties' respective  
20 contributions to the contamination existing at the site. More directly, this new data  
21 will impact any assessment of the total amount of hazardous waste released or  
22 disposed of at the Site, as well as assessments of the degree of toxicity of that  
23 hazardous waste. Finally, without access to the complete record of  
24 communications between HACLA, its contractors, and the DTSC since the  
25 remediation efforts began in April 2015, there is a large gap in the record of how  
26 HACLA has cooperated with or perhaps overridden the recommendations of  
27 DTSC regarding the work at the Site.

1 In short, any trial on liability and allocation issues at this time will  
2 necessarily be based upon an incomplete and inaccurate factual record, which will  
3 likely have a direct impact on the ultimate assignment and allocation of liability  
4 here.

5 **VI. CONCLUSION**

6 Based on all of the issues addressed above, the Defendants respectfully  
7 suggest that a bifurcation of liability and damages issues is not appropriate at this  
8 point and, moreover, that any effort to do so—*i.e.*, to try liability issues before all  
9 of the new facts and evidence developed at the Site have been subject to  
10 discovery—would unavoidably lead to a flawed trial on a meaningfully incomplete  
11 factual record.

12 Dated: October 23, 2015 Respectfully Submitted,  
13

14  
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26 **NO. 2, LESTER RUBEN CORPORATION NO. 3, FINKELSTEIN**  
27 **FOUNDATION, ESTATE OF LESTER M. FINKELSTEIN, DECEASED, AND**  
28 **ESTATE OF RUBEN FINKELSTEIN, DECEASED**

1 Dated: October 23, 2015

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